BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE OPINIONS OF THE COURTS BELOW.

The opinion of the United States Circuit Court of Appeals for the Fifth Circuit, November Term, 1942 was rendered on June 15th, 1943. The opinion together with the dissenting opinion of one of the Judges is to be found on page 45 of the record herein.

The opinion of the United States Board of Tax Appeals B.T.A. Docket No. 100771 was rendered on March 10th, 1942. It is to be found on page 14 of the record herein.

II.

JURISDICTION.

1. The statutory provision believed to sustain jurisdiction is Section 240 of the Judicial Code as Amended by the Act of February 13, 1925 (C. 229 sec. 1, 43 Stat. 938).

2. The judgment sought to be reviewed was entered on June 15th, 1943 (R. page 50).

3. The proceeding in which review is sought was initiated in the United States Board of Tax Appeals. It involved the liability of petitioner for income taxes as for a partial distribution in liquidation under Section 115 of the Revenue Act of 1936.

III.

STATEMENT OF THE CASE.

In March 1936, appellant, while acting as trustee

under the will of Emanuel Ulman, held 100 shares of the common stcok of the Coca-Cola International Corporation. Under the law of Georgia the trustee could not properly retain this stock, nor any common stock, and determined to sell it for the purpose of reinvestment in securities which it could properly retain. Formal corporate action was taken directing the sale of the stock. In September 1936 the trustee directed Fenner & Beane, members of the New York Stock Exchange, to sell the International stock.

Coca-Cola International Corporation was a holding company, and each share of International was equivalent in value to eight shares of Coca-Cola common. The sales price of International was consequently eight times that of Coca-Cola and International at the time of the transaction in question had a value of $969.00 per share. Coca-Cola was actively traded in on the market; International was rarely sold, and because of its high price it was difficult, if not impossible, to dispose of the International stock.

Accordingly Fenner and Beane suggested that the sale of the stock (which was petitioner's only objective) would be facilitated if they were permitted to exchange the International for Coca-Cola and forthwith sell the Coca-Cola.

The trustee authorized Fenner and Beane to proceed in accordance with their suggestion. Fenner and Beane exchanged the 100 shares of International with International Company for 800 shares of Coca-Cola common, which shares were issued in the name of Fenner and Beane. The certificates for the Coca-Cola were never delivered to appellant, and have never been in appellant's possession, but were forthwith sold on the

open market by Fenner and Beane and the proceeds remitted to appellant.

The net proceeds of the transaction were $96,926.02. The cost price of the International was $29,375.00, indicating a profit of $67,551.02.

The trustee, consistently with the only position it has ever taken in respect to this transaction, regarded the matter simply as a sale of a capital asset, and assumed that Section 112 (2) and 117 (a) of the Revenue Act of 1936 were applicable. The trustee made returns in accordance with this assumption. If the assumption is correct, the trustee's return is correct, and 40% of the gain or $27,025.41 was properly included in taxable income.

This is, and always has been, the position of the trustee.

The Commissioner took the position that the transaction was a distribution in partial liquidation of Coca-Cola International and that Section 115 (c) of the 1936 Revenue Act applied, so that 100% of the profit on the transaction should have been included in the return.

The result of the Commissioners' action was a finding of a deficiency in the trustee's return, resulting in a tax liability of $10,850.80.

The trustee filed its petition with the Board of Tax Appeals seeking to sustain its position; the Board of Tax Appeals on March 14th, 1942, decided against petitioner's contention. Petitioner thereupon filed its appeal in the Circuit Court of Appeals for the Fifth Circuit, which Court in a divided opinion affirmed the decision of the Board of Tax Appeals.

The petitioner now seeks a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit.

IV.

SPECIFICATION OF ERRORS.

The taxpayer relies upon and urges each of the following specifications of error:

1. The Board erred in holding that the amount of gain on the sale or exchange of the 100 shares of Coca-Cola International Corporation stock to be included in computing 1936 income tax liability of the estate was $67,551.02.

2. The Board erred in holding that the 800 shares of the Coca-Cola Company stock received by the brokers represented a distribution "in partial liquidation" of Coca-Cola International Corporation within the meaning of Section 115 (i) of the Revenue Act of 1936.

3. The Board erred in failing to hold that the exchange of 100 shares of Coca-Cola International Corporation stock for 800 shares of the Coca-Cola Company stock was merely an initial step in a single transaction sought to be accomplished by the sale of the Coca-Cola International Corporation stock.

4. The Board erred in failing to hold that in respect to the proceeds of the sale of said shares the estate was entitled to the benefit of the provisions of Section 117 (a) of the Revenue Act of 1936.

5. The Board erred in failing to find and to hold that the only purpose of the trustee was to accomplish the sale of the Coca-Cola International Corporation stock.

6. The Board erred in holding and deciding that there is a deficiency in 1936 income tax liability of the estate in the amount of $10,635.79.

V.

ARGUMENT.

WAS THE DISPOSITION OF THE INTERNATIONAL STOCK BY PETITIONER A PARTIAL LIQUIDATION OF THE COCA-COLA INTERNATIONAL CORPORATION OR WAS IT IN FACT A SALE OF THE STOCK IN INTERNATIONAL CORPORATION HELD BY PETITIONER?

The confusion which has arisen in seeking an answer to this question comes about because of the existence of two apparently inconsistent rules of law.

The first proposition is that regard must be had for substance rather than for form.

> *Eisner vs. Macomber,* 252 *U.S.* 189; 40 *Supreme Court* 189; 64 *L. Ed.* 521; 9 *A. L. R.* 1570.

The second is that what was done rather than the design and purpose of the participants should be the test.

> *U. S. vs. Phellis,* 257 *U.S.* 156, 172; 42 *Supreme Court* 63; 66 *L. Ed.* 180.

The inconsistency is more apparent than real and results from an effort to apply one principle to the exclusion of the other, even when to do so makes it necessary to break up one indivisible transaction into several parts and then to take one of these parts — in itself meaningless — and to reach a conclusion based

solely on the one fragmentary step in the unitary transaction. Obviously such a procedure can not be expected to produce a correct conclusion.

It has never been questioned that the sole intention, purpose and design of petitioner was to sell its Coca-Cola International stock in order to comply with the State Law. Petitioner consented that its agent exchange International for Coca-Cola common, and its agent immediately sold the Coca-Cola common. The common was never even registered in the name of petitioner. It is to be remembered that none of this was done until every effort to sell the International on the market proved that it was impossible to secure a purchaser for it, and that the only method left open to petitioner was the course which it took.

It inescapably follows that in substance what happened was that petitioner sold the International stock. Such a conclusion necessarily resulted from an economic standpoint since all that ever actually happened was that petitioner parted with the International stock and received the value thereof in exchange. Equally the same result is reached from a legal standpoint unless the purpose of the transaction be disregarded and one step isolated and held to be controlling without regard to the indivisible nature of the whole transaction. Such logic has never received the approval of this Court.

Helvering vs. Bashford; 302 *U.S.* 454; 82 *L. Ed.* 367.

Pearson vs. McGraw; 308 *U.S.* 313; 84 *L. Ed.* 293.

REASONS FOR GRANTING THE WRIT.

I.

PETITIONER RESPECTFULLY URGES THAT THE APPLICATION OF SECTION 115 (C) OF THE INTERNAL REVENUE CODE TO A SITUATION SUCH AS EXISTS IN THE CASE AT BAR IS AN IMPORTANT FEDERAL QUESTION WHICH SHOULD BE SETTLED BY THIS COURT.

The direct question involved has only arisen three times and all three cases involve similar transactions with respect to the same corporation, and all three were decided by the Circuit Court of Appeals for the Fifth Circuit.

The first two cases were Dodd vs. Commissioner, 131 Fed. (2d) 382 and Woodruff vs. Commissioner, 131 Fed. (2d) 429.

Both these decisions were unanimous and both were adverse to petitioner.

The third case is the case at bar in which one of the three Circuit Judges rendered a vigorous dissent to the rule laid down by the majority.

The majority opinion was based solely and squarely on the two decisions just referred to.

This Court has never passed directly on the issue involved.

It seems fair to say that this record presents an important Federal question which only this Court can finally determine.

II.

PETITIONER RESPECTFULLY URGES THAT IN THIS CASE THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT DECIDED A FEDERAL QUESTION IN CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT.

It is respectfully argued that the decision in this case is in conflict with Eisner vs. Macomber.

"In order therefore that the clauses cited from Article 1 of the Constitution may have proper force and effect, save only as modified by the amendment, and that the latter also may have proper effect, it becomes essential to distinguish between what is and what is not 'income' as the term is there used and to apply the distinction as cases arise according to truth and substance without regard to form."

> *Eisner vs. Macomber,* 252 *U.S.* 189; 40 *Supreme Court* 189; 64 *L. Ed.* 521; 9 *A. L. R.* 1570.

The decision of the Court below is in direct conflict with the principle laid down in the following cases:

> *Helvering vs. Bashford,* 302 *U. S.* 454; 82 *L. Ed.* 367.
>
> *Pearson vs. McGraw,* 308 *U.S.* 313; 84 *L. Ed.* 293.
>
> *Minnesota Tea Company vs. Helvering,* 302 *U.S.* 609; 82 *L. Ed.* 474; 58 *Supreme Court* 393.

The given result at the end of the path is the determinative factor in the eminently practical business of taxation.

With all respect it is maintained that the decision under consideration is in conflict with these decisions of this Court.

III.

PETITIONER FURTHER RESPECTFULLY URGES THAT THE DECISION IN THIS CASE IS IN CONFLICT WITH DECISIONS OF THE CIRCUIT COURT OF APPEALS FOR THE 2ND, 4TH AND 10TH CIRCUITS.

Petitioner does not maintain that the decision in the case at bar conflicts with decisions of the other Circuits on the identical subject matter involved; we do maintain that this decision is diametrically opposed to the substance of the decisions hereinafter discussed.

The substance of the decision in this case is that where two transactions are involved no matter how closely related they may be, and no matter how correct the purpose underlying the transaction may have been, if one can be separated from the other and a more severe tax imposed as a result, the integral transaction must be separated, the purpose and intention of the taxpayer disregarded and the isolated portion of the transaction alone recognized.

The Circuit Courts of Appeals for the Second, Fourth and Tenth Circuits have held consistently that a single transaction can not be treated as two separate transactions in all cases in which the taxpayer could secure a benefit by dividing the unified transaction into its constituent parts.

Prairie Oil & Gas Co. v. Motter, 66 F. (2d) 309; Tulsa Tribune v. Commissioner, 58 F. (2d) 937, 940; Helvering v. Security Savings & Commercial Bank, 72 F. (2) 874; Helvering v. General Utilities & Operating

Co., 74 F. (2d) 972; Ahles Realty Corporation v. Commissioner, 71 F. (2d) 150; Edgar W. Bassick v. Commissioner, 85 F. (2d) 8, 9.

It follows that if in the acquisition of property the transaction will be viewed as a whole and the steps not be separated, the same rule applies to the disposition of property and the steps not be separated. Such would be the conclusion in other Circuits; in the Fifth Circuit if the case at bar is followed, the result would necessarily be exactly the opposite.

CONCLUSION.

Petitioner has not undertaken in this brief to argue the main case in any detail. We have undertaken to show that the decision which we are seeking to review is erroneous. No one has ever questioned the absolute good faith of the taxpayer in this transaction and a statement of the conclusions reached by the Court below is perhaps as comprehensive an argument for a reversal of that decision as could be made in a more elaborate and extended brief.

It is respectfully submitted that this case calls for the exercise by this Honorable Court of its supervisory powers in order; first, that the construction and application of the Federal Tax Law involved be definitely settled; and second, that the errors of the United States Circuit Court of Appeals of the Fifth Circuit be corrected, and that to such end a writ of certiorari should

be granted and the Court should review the determination of said Circuit Court of Appeals and reverse it.

July 19th, 1943.

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